tion in *Handley* v. *Stutz, supra,* had been only half subscribed for, the corporation, while still a going concern as in that case, instead of issuing new stock, might have disposed of this remaining portion of original stock. In such a case, the "best price" should be the limit of the buyer's liability. It would hardly seem that the latter should be held for the par value, simply because the stock was part of the original issue.

The trust fund theory then, as to unpaid subscriptions, has little potency. In later decisions however, the Supreme Court states it, not as a doctrine to preserve the assets, but as a principle of administering the assets of an insolvent corporation when a court of equity has taken possession upon some wholly independent principle of equity jurisprudence. *Hollins* v. *Iron Co. supra; O'Bear etc. Co.* v. *Volfer* (1894) 106 Ala. 205, 226. There is in no sense a trust, so as to give a simple contract creditor any lien on the property, as was asserted in a recent case. *Swartley* v. *Oak Leaf etc. Co.* (Ia. 1907) 113 N. W. 496. It is after jurisdiction attaches, that the efficiency of the trust fund doctrine is found, and the assets are distributed *pari passu,* a result unlike the usual creditor's suit, for there the complainant would be preferred by the decree of the court, except where the assets are in the hands of a true trustee. *Iauch* v. *Socarras* (1898) 56 N. J. Eq. 524, 527.

PROVABILITY OF CONTINGENT CLAIMS IN BANKRUPTCY AND BANKRUPTCY AS AN ANTICIPATORY BREACH.—The bankruptcy statutes of 1841 and 1867 contained provisions for the proof of contingent claims, the latter statute allowing the creditor either to prove with the right to share in the dividends if the liability became fixed before final distribution, or to prove for the present value of the claim; the former statute allowing the first method with no limitation as to the time of fixing the liability, and the second method in certain specified cases. Earlier cases, holding all contingent claims provable, because of the presumed policy of the statute to discharge all claims, *Jameson* v. *Blowers* (N. Y. 1849) 5 Barb. 686; *Shelton* v. *Pease* (1847) 10 Mo. 474; *Reitz* v. *People* (1847) 72 Ill. 435, were limited by the rule later adopted that the claim was provable if the cause of action was contingent but not provable if the existence of the demand was contingent. *Riggin* v. *Magwire* (1872) 15 Wall. 549; *French* v. *Morse* (Mass. 1854) 2 Gray 111. This rule, seemingly referable only to the first method of proof, was an inexact way of saying that a contingent claim was not provable, if the extent of the liability as well as the cause of action was contingent, as in the case of a covenant of incumbrances, *Riggin* v. *Magwire, supra,* but was provable where the value of the claim, when the contingency happened, was estimable, as in the case of a bond for a fixed amount conditioned on a contingency. *Wolf* v. *Dix* (1878) 90 U. S. 1. Where the creditor proved for present payment under the second method, the present value of the claim must have been capable of estimation. See Blumensteil, Bankruptcy, 271, 275.

The present statute (1898) makes no express provision for the proof of contingent claims. The right given a surety of the bankrupt's creditor to prove by subrogation to the latter's right, § 57i, gives him an absolute not a contingent claim. § 63b, providing for the liquidation of claims, is held not to enlarge the class of claims provable under § 63a. *Dunbar* v. *Dunbar* (1902) 190 U. S. 304. § 63a provides "that debts of the bankrupt may be

proved which are (1) a fixed liability absolutely owing at the time of the filing of the petition whether then payable or not" and "(4) founded upon * * * a contract express or implied." It is generally held that contingent claims are not provable under a(1) since they are not absolutely owing. *In re Gerson* (1901) 105 Fed. 891; *In re Pettingill & Co.* (1905) 137 Fed. 143; but see *Cobb* v. *Overman* (1901) 109 Fed. 65. The omission of the words "absolutely owing" in a(4) seems to allow the proof of contingent debts based on contract. Thus it is held that the obligation of an indorser may be proved if the contingency, i. e., note's dishonor and notice, occur before the time for proving claims has expired. *In re Gerson, supra; In re Phillips Semmer Glass Co.* (1905) 135 Fed. 77. But the doctrine expressed in *In re Pettingill, supra,* that the provability of a claim depends upon its status at the time of the filing of the petition seems opposed to the result reached in the indorser cases. The general policy of the statute which makes the time of the filing of the petition of determinative importance, does not permit the proving of debts which had no existence at that time and to this extent the omission in a(4) of the limiting words contained in a(1) must be supplied. *In re Burka* (Fed. 1900) 5 Am. B. R. 12; *In re Adams* (Fed. 1904) 12 Am. B. R. 368. But in the indorser cases there is an existing debt, as debt is liberally defined by the statute, although owed contingently. Therefore to exclude the indorser's liability, the word "absolutely" as well as the words "owing" etc. must be inserted in a(4), an insertion which the policy of the statute does not demand and which by excluding the proof of all contingent claims will bring about an undesirable result.

A simple contract liability is not provable since there must be a demand founded thereon, see Collier, Bankruptcy (6th Ed.) 514, but this demand arises when the contract is broken. *In re Sterns* (1902) 116 Fed. 604. Furthermore it has been held that bankruptcy is a repudiation of a contract constituting an anticipatory breach, *In re Swift* (1901) 112 Fed. 315; *In re Pettingill, supra; In re Stern, supra,* and although this theory has been limited to contracts the performance of which is obligatory before date of the adjudication, *In re Imperial Brewing Co.* (1906) 143 Fed. 579, in most cases such a limitation is not observed, since the more reasonable view is to regard bankruptcy as a repudiation of all existing obligations. Thus generally in jurisdictions where the doctrine of anticipatory breach is law, see Page, 3 Contracts 2220; *Roehm* v. *Horst* (1900) 178 U. S. 1, provable claims would arise on the contracts of a bankrupt, subject to the limitation that the doctrine does not apply to contracts for the payment of money where one side has been executed, see 6 COLUMBIA LAW REVIEW 589, and to the limitation that the trustee may elect to carry out the contract. See *In re Pettingill, supra.* It would seem that contingent claims resting on contracts thus repudiated might be proved either, by analogy to the indorser cases, if the contingency happens before the time for proving has expired, thus assimilating the practice under the old statute, see Collier, Bankruptcy (6th Ed.) 514; but see *In re Pettingill, supra,* or when the extent of the contingent liability can be fairly calculated. See *Dunbar* v. *Dunbar, supra.* But where the contingency has not happened and the claim cannot be estimated there is no provision for conditional proof as under the former

statute. See *supra.* The decision in *Dunbar* v. *Dunbar, supra,* that a claim on a life annuity, conditioned on the annuitant remaining unmarried, was too contingent for proof, indicates that a contingent claim capable of estimation could be proved.

In a recent case the court overruled the defendant's plea of a discharge in bankruptcy in an action on a contract to purchase stock on or before a certain day. *Phenix Nat'l Bank* v. *Waterbury* (1908) 38 N. Y. Law Jour. 110. The contract did not create a debt since there could be nothing owing until the stock was tendered. See *Ames* v. *Moir* (1891) 138 U. S. 306. Nor did a debt arise on the contract because of bankruptcy since, conceding that the bankruptcy might be an anticipatory breach it is not so considered unless the party elects to recognize it as such. *Roehm* v. *Horst, supra.* It follows that since the party did not attempt to prove his claim, he did not make his claim provable and therefore was not barred in the subsequent action. The logic of this application of the doctrine of anticipatory breach to bankruptcy cannot be questioned, but it would not be surprising if the courts ultimately refused a creditor the option given him in the principal case.

Chattel Mortgages of After Acquired Property.—Since "a man cannot grant or charge that which he hath not," Perk., 65, a chattel mortgage, operating as a present sale subject to a condition subsequent, is ineffectual in general to pass title to after acquired property, *Lunn* v. *Thornton* (1845) 1 C. B. 379; *Jones* v. *Richardson* (1845) 10 Met. 481; but see *American Cigar Co.* v. *Foster* (1877) 36 Mich. 368, subject to the exception that if the property has a potential existence, title passes, *Grantham* v. *Hawley* (1615) Hob. 132, a distinction the artificiality of which is illustrated by the irreconcilable diversity of the decisions in its application. Cf. *Briggs* v. *U. S.* (1891) 143 U. S. 346; *Rochester Distilling Co.* v. *Rasey* (1894) 142 N. Y. 570; *Comstock* v. *Scales* (1859) 7 Wis. 159; *Van Hoozer* v. *Cory* (1860) 34 Barb. 9. Any new act, however, when the property is acquired, sufficient to transfer title, brings it within the operation of the mortgage, Bacon, Max. R. 14, subject to the intervening rights of third parties; *Spinney* v. *Meloon* (N. H. 1907) 68 Atl. 410; thus, delivery by the mortgagor, *Stern* v. *Simpson* (1878) 62 Ala. 194, indorsement upon the mortgage, *Brown* v. *Thompson* (1871) 59 Me. 372, and, it would seem, the mere act of bringing the property upon the mortgagor's premises, if agreed to, see *Reeves* v. *Barlow* (1884) L. R. 12 Q. B. D. 436, though this result is hardly reconcilable with the broad statements in the earlier cases. Benj., Sales (5th Ed.) 129. So, also, if the mortgagee takes possession with the consent of the mortgagor, *Peabody* v. *Landon* (1888) 61 Vt. 318, or under a power to seize for that purpose, *Congreve* v. *Evetts* (1855) 10 Ex. 297; *Chase* v. *Denny* (1881) 130 Mass. 566, which power, coupled with an interest, *semble, Wood* v. *Leadbitter* (1845) 13 M. & W. 837, 846, would be irrevocable, see *McCaffrey* v. *Woodin* (1875) 65 N. Y. 459; contra, *Chynoweth* v. *Tenney* (1860) 10 Wis. 397, save by a discharge of the principal debt as in bankruptcy. *Thomson* v. *Cohen* (1872) L. R. 7 Q. B. 527. Seizure under the insecurity clause, *Francisco* v. *Ryan* (1896) 54 Oh. St. 307, or under the foreclosure clause, *Bennett* v. *Bailey* (1889) 150 Mass. 257; *Keating* v. *Han-*